

(12)  
No. 89-1027

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,  
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,  
*Respondents.*

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit**

**PETITIONERS' RESPONSE TO MOTION TO DISMISS**

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June 1990

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Relying on a press release advertising a decision of the Interstate Commerce Commission ("ICC") that has not yet been issued or served, and the terms of which have not been made public, respondent American Train Dispatchers Association ("ATDA") asserts that the writ of certiorari should be dismissed because this case is now moot. Nothing could be farther from the truth.

This case is not moot. Mootness occurs when a case no longer presents a live controversy between parties with a legally cognizable interest in the outcome. Even assuming *arguendo* that the press release accurately

forecasts the ICC's eventual decision, all that the press release shows is that the ICC, on remand, has changed course and resolved some aspects of the matter before it adversely to petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern"). Far from rendering the case in this Court moot, the action of the ICC as advertised instead serves to accentuate the immediate harmful effects on NW's and Southern's interests of the Court of Appeals' erroneous construction of the exemption "from all other law" contained in 49 U.S.C. § 11341(a), and the need for this Court to reverse the Court of Appeals' decision.

#### STATEMENT

This case seeks review of the Court of Appeals' reversal of a decision of the ICC affirming an arbitration award rendered under Article I, § 4 of the ICC's *New York Dock*<sup>1</sup> labor protective conditions.

The arbitration award imposed an "implementing agreement," in terms proposed by petitioners, that governed the transfer of certain work from an NW facility in Roanoke, Virginia to a Southern facility in Atlanta, Georgia. On appeal, the ICC affirmed the arbitration award in all respects. On judicial review, the Court of Appeals reversed the ICC's decision, holding that the ICC had erred in finding that § 11341(a) was effective to override provisions in a collective bargaining agreement. The Court of Appeals declined to reach the questions whether § 11341(a) overrides the Railway Labor Act ("RLA") or whether,

<sup>1</sup> *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

by operation of 49 U.S.C. § 11347, the arbitration procedure in the protective conditions precluded the assertion of RLA claims, and the court remanded these issues to the ICC. 89-1027 Pet. App. 25a-26a. This Court granted certiorari to review the interpretation of § 11341(a) underpinning the Court of Appeals' decision.

Meanwhile, the ICC has been conducting its proceeding on remand from the Court of Appeals. The ICC, in general fashion, discussed its proposed decision on remand at open voting conferences, on February 9 and May 15, 1990. On May 17, 1990, the ICC issued a press release which, for the first time, indicated that, instead of again affirming the arbitrator's award, the ICC would vacate that award and send the matter back to the parties for further negotiation and, if need be, arbitration of an appropriate implementing agreement. The terms of the ICC's decision have not been made public.<sup>2</sup> Nevertheless, on the strength of the May 17, 1990 press release, ATDA moves to dismiss the writ of certiorari on the ground of mootness.

#### ARGUMENT

This proceeding is not moot. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The "burden of demonstrating mootness 'is a

<sup>2</sup> The transcripts of the voting conferences contain no references to the vacating of the arbitrator's award. We must await public issuance of the ICC's decision to see what the ICC's ruling really is.



heavy one,' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)); accord *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-70 (1984), which ATDA has utterly failed to meet.

ATDA's own remarkable motion amply demonstrates the point. ATDA contends that the case is somehow moot because the ICC, on remand, has assertedly jettisoned § 11341(a) in favor of a " 'new approach,' " founded entirely on § 11347, that "has constrained [the ICC] to reverse and vacate the arbitration award which it had previously affirmed. . . ." Motion at 5. But this result, assuming *arguendo* it is the one the ICC has actually reached, proves not mootness, but precisely the opposite: that the controversy between the parties over the scope of the § 11341(a) exemption remains very much alive.

ATDA ignores that the ICC's handling of the case on remand has necessarily been conducted within the restrictive confines of the erroneous interpretation of § 11341(a) adopted by the Court of Appeals. While initially the ICC fully upheld the arbitration award in reliance, in part, on § 11341(a), it now appears that the ICC may have determined that, absent this legal support, the arbitration award does not warrant affirmation. The ICC's "new approach," if it be that, therefore shows not that the decision of the Court of Appeals is no longer consequential but, rather, that the court's mistaken decision has caused the ICC to adopt an artificially narrow conception of its Interstate Commerce Act powers. This is exactly what we predicted might happen when we petitioned this Court for a writ of certiorari. 89-1027 Pet. 24-25.

In addition, as we have previously observed,<sup>3</sup> the Court of Appeals' misreading of § 11341(a) will adversely affect these petitioners now in matters having nothing to do with ICC review of arbitration awards under the protective conditions and in forums other than the ICC. The ICC's holding on remand cannot define the limits of the reach and operation of the § 11341(a) exemption. The exemption is self-executing; it does not depend on ICC action at all, beyond the initial approval of the transaction to which the exemption attaches. *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948). The ICC is not charged with sole responsibility for determining whether a railroad may claim the benefit of the exemption. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring) ("Any tribunal that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction. . . .'" (quoting 49 U.S.C. § 11341; emphasis added)). Moreover, the ICC's proceedings on remand involve only labor agreements governed by the RLA. The ICC's ruling on that issue will have no effect on the broader issue raised by the Court of Appeals' holding that the § 11341(a) exemption does not apply to contracts of any type, even if allowing enforcement of those contracts would interfere with the implementation of an ICC-approved transaction.<sup>4</sup>

<sup>3</sup> Petitioners' Reply To Briefs In Opposition, at 2 (filed March 8, 1990).

<sup>4</sup> ATDA's current motion is little more than a continuation of the position it unsuccessfully advanced in initially opposing the petition for certiorari. At that time, ATDA contended (Br. In

The pernicious effect of the Court of Appeals' decision appears to have been felt by the ICC. For many years, the ICC has relied on § 11341(a) as a source of authority for its position that labor agreements governed by the RLA must yield to the carrying out of an approved transaction. Applying the erroneous holding of the Court of Appeals, in accordance with the doctrine of "law of the case," the ICC has evidently found its authority to be more restricted than the ICC previously had considered that authority to be.<sup>5</sup> This action (if it in fact has occurred) puts at risk the resolution of the controversy between petitioners and ATDA over the terms of the agreement to govern the transfer of work from the NW facility to the Southern facility that the arbitrator's award imposed and the ICC initially upheld. The decision of the ICC, as advertised in the May 17, 1990 press release, plainly does not make this case moot<sup>6</sup>

Opposition at 11) that the petition was premature because the ICC on remand might "develop a position satisfactory to petitioners and legally acceptable to the court of appeals." We explained that the petition was not premature because, *inter alia*, as indicated in text above, issues as to the proper application of § 11341(a) would remain outstanding whatever the ICC decided on remand. In any case, if the ICC's press release accurately describes the agency's decision on remand, then that decision certainly will not eliminate the need for review by this Court because the decision no longer supports our position that the arbitration award should be affirmed in full.

<sup>5</sup> The ICC argues in this Court that the decision of the Court of Appeals is wrong and should be reversed. Brief For The Federal Respondents Supporting Petitioners (filed May 25, 1990).

<sup>6</sup> Moreover, if the case were moot, which it is not, the remedy would be for this Court to vacate the judgment of the Court of Appeals. The effect of that action would be to deprive the decision of the Court of Appeals of all precedential effect and to

but, to the contrary, emphasizes the need for corrective action by this Court.<sup>7</sup>

### CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted,

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reinstate the ICC decision sustaining in full the arbitration award in this case. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *County of Los Angeles v. Davis*, 440 U.S. 625, 634 & n.6 (1979); *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329-30 (1961).

<sup>7</sup> For all these same reasons, ATDA's alternative request to dismiss the writ of certiorari on the ground that the case no longer is "of any general importance," Motion at 6, is entirely without merit and should be rejected.